



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 285 OF 2012

VIRGINIA NJOKA.....PLAINTIFF

VERSUS

JOEL NATHAN OMUMIA.....1ST DEFENDANT

CITY COUNCIL OF NAIROBI.....2ND DEFENDANT

JUDGEMENT

1. The Plaintiff filed this suit as the widow and administratrix of the Estate of the late Elias Njage Njoka, who had been allocated the piece of land known as Plot No. B1-202 in Kayole (“the Suit Property”) by the 2nd Defendant. She noted in April 2012 that 1st Defendant had commenced construction on the Suit Property without her consent. She reported the matter to the area Chief and also wrote to the 2nd Defendant to complain.

2. The Plaintiff seeks a mandatory order to direct the 1st Defendant to pull down and remove the structures and building materials on the Suit Property, and a permanent injunction to restrain the 1st Defendant or his agents from continuing the construction on the Suit Property. She also seeks a declaration that the Suit Property belongs to her, damages, costs and interest.

3. The 1st Defendant denied the Plaintiff’s claim and averred in his Defence filed in court on 7/6/2013 that he is the bona fide owner of the Suit Property. He urged the court to dismiss the suit. The 2nd Defendant also denied the Plaintiff’s claim in its Defence filed on 31/7/2012. It stated that it would raise a preliminary objection that the Plaintiff lacked *locus standi* to bring the suit and maintained that there was no link between the Plaintiff and the Suit Property.

4. This case is not straight forward with regard to the position taken by the 2nd Defendant which was the authority that allocated the Suit Property. Oduma Joshua Owuor who was the 2nd Defendant’s Director of legal affairs swore a Replying Affidavit on 31/7/2012 in which he stated at paragraph 7 that according to the 2nd Defendant’s records, the Suit Property never changed hands from the late Elias Njage Njoka or his legal successors to any other person. He attached documents including a letter dated 18/9/1997 emanating from the Acting Director of Housing Development and Management which confirmed that the Suit Property belonged to Eliaz N. Njoka and that it was anticipated that a title deed would be issued to him in due course. A notice to withdraw this Affidavit was filed on 7/9/2012 stating that it was erroneous.

5. Another Replying Affidavit sworn by A. J. Owuor who deponed that he was the 2nd Defendant’s Director of Legal Affairs Department was filed on 7/9/2012. He deponed that Elias Njage Njoka failed to redeem the property by paying the outstanding rates following which the plot was reallocated to the 1st Defendant. He attached a copy of the 2nd Defendant’s Enforcement Notice dated 31/5/2012 which required the demolition of the illegal structures from the Suit Property. A notice to withdraw this Replying Affidavit was filed on 24/10/2012 for the reason that it was erroneous.

6. Karisa Iha swore the Replying Affidavit dated 23/10/2012 in which he deponed that Elias Njage Njoka failed to meet the 2nd Defendant’s conditions for allocation of the suit plot and that he was in arrears from August 1992 to 1997. He further stated that the 2nd Defendant issued a statement of account for the Suit Property. This contradicts the 2nd Defendant’s letter dated 18/9/1997 from its Director of Housing Development and Management which confirmed that the Suit Property belonged to Eliaz N. Njoka.

7. The Plaintiff gave evidence on 31/7/2017. She stated that her husband was allocated the Suit Property in 1997 when he made an outright purchase. She stated that she was up to date with the payment of rates for the suit plot and that the plot was vacant until April 2012 when the 1st Defendant started putting up the foundation for a structure on it. She produced various documents including her late husband’s card issued by the 2nd Defendant dated 1/8/1992; the 2nd Defendant’s letter of 16/9/1997 addressed to Eliaz N. Njoka demanding payment of Kshs. 9490.80 on account of survey fees, legal fees, rates and rent; the 2nd Defendant’s letter of 18/9/1997 addressed ‘To whom it may concern’ which confirmed that Eliaz N. Njoka owned the suit plot, a copy of the Grant of Letters of Administration over her late husband’s estate and

the Confirmation of Grant. She also produced copies of receipts issued by the 2nd Defendant in the name of her late husband E. N. Njoka, for payment of rent dated 18/8/2004, 20/9/2006 and 26/4/2011. The 2nd Defendant issued a card in her husband's name dated 18/3/2011 demanding payment of rates and rent of Kshs. 1766/=. The latest receipt issued by the 2nd Defendant in the name of Elias Njage Njoka is the one dated 19/05/2017.

8. Paul Mwangi Gachomba gave evidence on behalf of the 2nd Defendant on 1/8/2017. He stated that according to the records held at the 2nd Defendant's Dandora offices, the suit land was allocated to Elias Njage Njoka vide a letter of allotment dated 2/7/1992 reference number HDD/622/P.I.AD.4.1/BMG/L.S and that he was still the current rates payer. The land was allocated to Elias Njage Njoka after Pauline N. Kamau who had initially been allocated the suit plot failed to comply with the 2nd Defendant's conditions for the allotment.

9. After the Plaintiff and the 2nd Defendant had closed their cases, the 1st Defendant filed the application dated 3/8/2017 seeking to reopen the Plaintiff's case and to be allowed to cross examine the Plaintiff's witnesses. Parties recorded a consent on 13/11/2017 allowing the 1st Defendant to cross examine the Plaintiff's witnesses. The 1st Defendant cross examined the Plaintiff on 12/6/2018. On cross examination the Plaintiff stated that the 2nd Defendant had not sent her any communication indicating that it wished to repossess the Suit Property from her. She stated that she had continued to pay rates to the 2nd Defendant.

10. The 1st Defendant testified. Sometimes in 2012 he learnt that the 2nd Defendant had repossessed plots from persons who had failed to meet the conditions for the allotment. He stated that he was shown a list of the available plots and upon viewing the Suit Property he made an offer to the 2nd Defendant to purchase the plot. The 2nd Defendant accepted his offer on condition that he paid Kshs. 140,150/= which included legal fees, stand premium and rates, which sum he claimed to have paid in full. He was issued a statement of account dated 26/4/2012 and a receipt for payment of rent.

11. The card he produced demanded payment of Kshs. 140,150/= and the receipts he produced are for the sums of Kshs. 15,000 dated 27/4/2012, Kshs. 9950/= dated 9/5/2012, Kshs. 13,000/= dated 8/6/2012. He also produced a copy of another card issued by the 2nd Defendant on 8/6/2012 which demanded payment of Kshs. 13,000/=. It is not clear why the sum demanded was varied downwards from that sought in the statement of account dated 26/4/2012. He also produced a copy of the card for the Suit Property, and his letter of 6/7/2012 seeking the 2nd Defendant's intervention in the case where he had been sued over the Suit Property. He stated in that letter that he had been in possession of the Suit Property after he was allocated the plot due to non-payment of rent. He also produced a receipt dated 8/2/2013 issued by the 2nd Defendant on account of payment of part market sale.

12. On cross examination, the 1st Defendant conceded that he did not fully pay the sum demanded by the 2nd Defendant, he only paid Kshs. 40,950/= for the market sale.

13. Parties filed submissions. The 2nd Defendant submitted that the Suit Property belonged to Elias Njage Njoka and that the 1st Defendant had failed to show that he owned the suit land. The 2nd Defendant conceded that neither party had produced a certificate of title to confirm absolute ownership and relied on the judgement of Mumbi Ngugi J. in **Evans Kafusi Mcharo v The Permanent Secretary, Ministry of Roads, Public Works and Housing and Another Nairobi Misc. Civil Application No. 207 of 2004** where the court stated that a letter of allotment is not proof of title but is only a step in the process of allocation of land.

14. The 1st Defendant submitted that the evidence of Paul Mwangi Gachomba who gave evidence on behalf of the 2nd Defendant should be disregarded. These are the arguments which the 1st Defendant ought to have challenged or clarified from the witness during cross examination but unfortunately the 1st Defendant did not cross examine the witness. The 1st Defendant submitted that he had produced receipts showing he was the owner of the Suit Property although he was yet to finish making payments.

15. The issue for determination is who between the 1st Defendant and the Plaintiff has a better claim to the Suit Property. The Plaintiff produced documents from the 2nd Defendant confirming that her late husband was allocated the Suit Property, including the letter dated 16/9/1997 addressed to Elias N. Njoka which stated that since he had paid for the Suit Property in full, he was to arrange to pay survey fees, legal fees and other outgoings for the preparation of the assignment.

16. Neither Defendant produced evidence of Elias Njage Njoka's failure to comply with the 2nd Defendant's conditions for the allotment of the Suit Property or repossession of the plot from Elias Njage Njoka. The Plaintiff produced receipts issued by the 2nd Defendant showing that she has been paying rates for the suit land. The plot was not available for allocation to the 1st Defendant in 2012, the 2nd Defendant having allocated it to the Plaintiff's late husband in 1997.

17. The court is satisfied that the Plaintiff has proved her case on a balance of probabilities and grants prayers 1,2 3 and 5 sought in the Plaint. The court declines to award damages to the Plaintiff had not developed the Suit Property.

Dated at Nairobi this 18th day of January 2019.

K. BOR

JUDGE

In the presence of: -

Ms. Lusigi for the 1st Defendant

Ms. Eddel Barasa – Court Assistant

No appearance for the Plaintiff and 2nd Defendant